SUMMARY OF CASE

On August 19, 2004, Jesus Nevarez-Sanchez was indicted for one count of felon in possession of a firearm. He pled not guilty to this offense.

The case was tried before a jury on May 16-17, 2005 and Nevarez was convicted on May 17, 2005. The Probation Office recommended that Nevarez' sentence be enhanced for obstruction of justice. Nevarez filed objections to the PSR and a Motion for Downward Departure. The Court, after determining that the correct offense level was 26 and that the criminal history category was V, denied the objections and sentenced Nevarez to 110 months in prison. The Appellant's downward departure motion was also denied. He filed a timely notice of appeal on August 12, 2005.

REQUEST FOR ORAL ARGUMENT

The Appellant requests 10 minutes of oral argument in this case per side in order to assist the court in making its decision in this case. The Appellant submits that oral argument would be helpful in explaining the issues involved in the case.

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PRELIMINARY STATEMENT

The sentencing judge in this case was Judge Richard G. Kopf. The Court has subject-matter jurisdiction pursuant to 18 U.S.C. 922(g)(1). The Court has appellate jurisdiction under 18 U.S.C. §§3731 and 3742 and Rule 4(b) of the Federal Rules of Appellate Procedure. Nevarez has the right to appeal his conviction and sentence within 10 days. The Notice of Appeal was

timely filed on August 12, 2005. This appeal is from a final order or judgment of the District Court of Nebraska.

STATEMENT OF THE ISSUE(S)

I. WAS THERE INSUFFICIENT EVIDENCE TO SUPPORT NEVAREZ' CONVICTION?

A. Standard of Review: *United States v. Fitz*, 317 F.3d 878 (8th Cir. 2002).
B. Other cases:
United States v. Madkins, 994 F.2d 540 (8th Cir. 1993).
United States v. Berkman, 957 F.2d 108 (4th Cir. 1992).

II. DID THE COURT ERR IN CONSIDERING NEVAREZ' PRIOR CONVICTIONS THAT HE DID NOT STIPULATE TO AT TRIAL WITHOUT CONVENING A SENTENCING JURY IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS?

A. Standard of Review: *United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995)
B. Other cases:
Almendarez-Torres v. United States, 523 U.S. 224 (1998).
Apprendi v. New Jersey, 530 U.S. 466 (2000).
Shepard v. United States, 125 S.Ct. 1254 (2005).
Blakely v. Washington, 124 S.Ct. 2531 (2004).

III. DID THE COURT ERR IN ENHANCING NEVAREZ' SENTENCE FOR OBSTRUCTION OF JUSTICE WITHOUT CONVENING A SENTENCING JURY AND BY FINDING THESE FACTS BY A MERE PREPONDERANCE IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS?

A. Standard of Review: *United States v. Murphy*, 65 F.3d 758 (9th Cir. 1995).
B. Other cases:
United States v. Thurmon, 278 F.3d 790 (8th Cir. 1992).

United States v. Okai, 2005 WL 2042301 (D.Neb. Aug. 22, 2005).
United States v. Booker, 2005 WL 50108 (Jan. 15, 2005).
United States v. Brooks, 174 F.3d 950 (8th Cir. 1999).

STATEMENT OF CASE

Jesus Nevarez-Sanchez was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1). Nevarez pled not guilty and was tried by a jury. Judge Kopf sentenced him to 110 months in prison, 3 years of supervised release, and a $100 special assessment.

STATEMENT OF FACTS

On March 26, 2004, Nevarez traveled from Grand Island, NE to York, NE on I-80 in a green Dodge Neon, a borrowed vehicle. He testified at trial that he was to take this vehicle to Lincoln, exchanging it for another vehicle to return to Grand Island. Trooper Bruce Okamoto came up to him at the Petro gas station in York, Nebraska. After the trooper stopped his vehicle, he noticed Nevarez' driver seat drop out of view for 30 seconds to one minute. Okamoto also noticed Nevarez kicking something which looked like a small butane torch out of his view. Nevarez testified that he was attempting to kick the torch into Okamoto's view as Okamoto was asking him "what is that?" with reference to the torch. After ticketing him for no operator's license, he obtained his consent to search the vehicle. In that

search, a 40-caliber firearm was found under the driver seat. Okamoto asked Nevarez for his driver's license. Nevarez told Okamoto his license was suspended. Nevarez testified that he did not know the gun was in the car at trial and the jury chose to disbelieve him, convicting him of this offense.

Okamoto testified that he was given Nevarez' license plate number and vehicle description from dispatch and that he did not know from whom dispatch received this information. Okamoto did not himself see Nevarez' vehicle being driven erratically although he did notice that Nevarez appeared to be traveling roughly 40 miles per hour. The minimum speed limit at that point on the Interstate was 40 miles per hour. In Okamoto's police report he noted that the minimum speed limit was 45 miles per hour at the York interchange on the interstate.

No identifiable fingerprints were found on the gun located in the vehicle Nevarez was driving. No prints were found matching Nevarez' prints. No objects were on top of the gun concealing it when it was located. Nevarez admitted to Okamoto that he did own the tools, a cell phone, cigarettes, and a cigarette lighter that were found in the car but not the gun. Nevarez did respond that the car was having some problems when asked about this by Okamoto. Nevarez testified that he had worked on the car

earlier and that the car was having trouble starting and maintaining a certain speed on the interstate or that the car would lose power from time to time.

The defense filed a Motion to Suppress, which after the Court held an evidentiary hearing, was denied. The case proceeded to trial.

SUMMARY OF ARGUMENT

Nevarez' argues: 1) there was insufficient evidence to prove that he knew the gun was in the car and thus insufficient evidence to convict; 2) that the Court violated his Sixth Amendment rights in not submitting prior convictions he did not stipulate to at trial to a sentencing jury; and 3) that the Court erred in improperly enhancing his sentence for obstruction of justice in violation of his Fifth and Sixth Amendment rights without submitting the issue to a jury. (Nevarez does not dispute the fact that he is a convicted felon or the interstate commerce prongs that must be proven to establish these portions of the offense at trial. The defense stipulated to those two elements at trial.)

ARGUMENT

I. WAS THERE INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT NEVAREZ KNEW THERE WAS A GUN IN THE VEHICLE FROM WHICH HE WAS ARRESTED?

The standard of review to evaluate the sufficiency of the evidence to sustain a conviction is de novo. *United States v. Fitz*, 317 F.3d 878, 881 (8th

Cir. 2002). "In reviewing the sufficiency of the evidence to support a guilty verdict, [the court] look[s] at the evidence in the light most favorable to the verdict and accept[s] as established all reasonable inferences supporting the verdict. *Id.* (quoting *United States v. Cruz*, 285 F.3d 692, 697 (8th Cir. 2002).

The closest case on point on this issue within this Circuit is: *United States v. Madkins*, 994 F.2d 540 (8th Cir. 1993), where this Court held there was insufficient evidence to convict the defendant of possession of a gun found under the front seat of a car. He was working under the hood, and no one saw him with the gun, no fingerprints were found, and the ownership of the car was never established.

In this case, the gun was found under the front seat, the Appellant had worked on the car earlier in the day, no one saw him with the gun according to testimony at trial, and the ownership of the vehicle was not clearly proven other than the fact that Danyto Morales-Reyes testified he owned it at one point. At most Trooper Okamoto testified that it looked like Nevarez looked like he was kicking something under the seat but he could not tell what it was at that time.

In another related case, in *United States v. Berkman*, 957 F.2d 108 (4th Cir. 1992), the Court held that the fact that an officer saw a passenger's shoulder dip as he approached the car and the fact he found a pistol under

the seat was insufficient to prove constructive possession of that pistol. Okamoto observed Nevarez recline in his driver's seat for less than a minute. Surely this cannot be sufficient to substantiate this conviction alone.

Trooper Okamoto made some critical mistakes in this case. First, he mistakenly wrote that the speed limit on Interstate 80 near York, Nebraska was 45 mph when it is actually 40 mph. Second, he put Nevarez' incorrect date of birth on his police report (May 26, 1964 instead of June 26, 1964). Finally, he at first testified at trial that Nevarez told him "I don't know" in response to a question about guns or explosives in the car. Later (after watching the police video at trial) he corrected himself to say that Nevarez' answer to that question was "not as far as I know" which is closer to "no" than "I don't know". The video further indicates that Nevarez' initial response to Okamoto after being informed the gun was found in the car was for the Appellant to ask "What?!?" which proves he was surprised himself by the trooper discovering the gun. Nevarez did not think he had anything to hide, which is why he consented to the search.

Nevarez honestly answered questions in which he gave his correct name, date of birth, status of his driver's license, and residential address. Okamoto administered basic sobriety tests for Nevarez which he passed. Although Okamoto thought Nevarez might be having medical problems, he did not ask

Nevarez about this as Nevarez told him he was having car trouble. Okamoto thought Nevarez was reclining in the car to hide from him. However, Nevarez testified that he reclined in the car accidentally out of frustration with the car trouble he was having. If he wanted to hide, he would have remained reclined in the car or fled.

Danyto Morales-Reyes' testimony at trial proved nothing other than confusion. He could not remember if Nevarez fixed his Honda or Neon. (Nevarez testified that he fixed the Honda for Morales-Reyes and not the Neon.) He was confused as to when he first met Nevarez: at first he said Dec. 2003-Jan. 2004, then later he said November 2003. He could not recall when the alleged conversation with Nevarez about exchanging money for the Neon car title took place. He gave conflicting answers on when the plates on the Neon were to expire: Dec. 2003 was his answer on cross and Feb. 2004 was his answer on redirect. Although Morales-Reyes claimed that Nevarez met with him in Dec. 2003-Jan. 2004 with an unknown man, Nevarez denied there was another man with him when he met with Morales-Reyes.

John Paul Petersen's testimony is fraught with difficulties. Of primary concern to the Appellant is the unsolicited post-trial disclosure of Melvin Jones, an incarcerated individual who was lodged at Saline County Jail,

Nebraska who informed us that Petersen told Jones he intended to lie at Nevarez' trial in order to get a sentence reduction for himself. The scheme was very simple: lie against Nevarez and cut your jail sentence in half or more. The defense filed a Motion for New Trial and an affidavit from Mr. Jones in support. The Court denied the motion for new trial.

Petersen had every incentive to lie at trial to cut his 87-month sentence to try to punch his "get out of jail free and sooner" card. Petersen was very fortunate in having his indictment changed to reflect a much lower drug quantity (50 grams or more instead of 500 grams or more of methamphetamine), thus reducing his jail exposure from 10 years to life to 5-40 years. (Petersen said he did not remember the drug quantity being changed. However, Exhibits 108 and 109 [his superseding and second superseding indictments] prove otherwise.) Petersen also admitted having felony cases in both Sarpy and Seward Counties, Nebraska dismissed as a result of his plea in federal court. Petersen testified at trial that he admitted to Capt. Bullock of the Lincoln Police Department Narcotics Unit that he lied in some of the proffers he gave. So he already is an admitted liar and a convicted felon and drug addict from age 15 until he was indicted at age 38-39 with no control over his addiction. Petersen mistakenly referred to the gun in question as a 45-caliber gun. It was in fact a 40-caliber gun.

Petersen testified at trial that Nevarez told him that Nevarez intended to lie about whether he knew the gun was in the car and that this constituted Nevarez' strategy to "beat" or "win his case". Petersen testified that this conversation happened at CCA-Leavenworth Detention Center in Leavenworth, Kansas during a period of time when he and Nevarez were cellmates. However, Nevarez testified that he was working a job at CCA-Leavenworth at the time and also taking business classes so he and Petersen did not see or talk with each other very much. Nevarez testified this conversation never happened and that he did testify honestly at trial.

Petersen's testimony that Nevarez intended to lie about whether he knew the gun was in the car is false. Nevarez' testimony itself indicates it is false. Melvin Jones' affidavit supports that conclusion as well.

Nevarez' testimony indicates the window of opportunity for Petersen to have this alleged discussion with Nevarez was narrower than Petersen implied and Nevarez denied at trial in his testimony that this discussion ever took place. Nevarez was too busy at the jail at CCA-Leavenworth with his job and business classes to discuss his case with fellow inmates such as Petersen. See Melvin Jones affidavit in Addendum. Even Petersen admitted that he and Nevarez kept to themselves while cellmates, which suggests that it is extremely unlikely, this discussion took place.

II. DID THE COURT ERR IN CONSIDERING NEVAREZ' PRIOR CONVICTIONS THAT HE DID NOT STIPULATE TO WIHTOUT CONVENING A SENTENCING JURY IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS?

The standard of review regarding the legality of a sentence is "reasonableness" *United States v. Booker,* 2005 WL 50108 (Jan. 15, 2005). The Ninth Circuit has evaluated the legality of a sentence by de novo review. *United States v. Murphy*, 65 F.3d 758, 768 (9th Cir. 1995).

The issue of whether Nevarez' prior convictions can be used to increase his sentence beyond the statutory maximum must be submitted to a jury and found beyond a reasonable doubt. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court held that the Sixth Amendment requires that "any fact that increases the penalty for a crime beyond the statutory maximum [other than the fact of a prior conviction]. . .be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The "prior conviction" exception is a hanging thread from the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which was the first case to hold that prior convictions could be treated as sentencing factors for the court to decide, rather than elements of the offense, for purposes of determining the maximum penalty. However, *Almendarez-Torres*' continued constitutional validity is very doubtful in light of later Supreme Court precedent eliminating the distinction between sentencing factors and

elements of the offense, and focusing instead on the effect of enhancements on a defendant's Sixth Amendment rights.[1] This focus culminated with the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), where the Court held:

> [O]ur precedents make clear. . .that the "statutory maximum" for *Apprendi* purposes is the maximum sentence the judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Id. at 2537. (emphasis added) (internal citations and quotations omitted). *Blakely* cemented the reality shown in *Apprendi* that is "the 'effect' brought about by the court's action that is determinative rather than the 'labels' attached to the sentencing procedures." *State v. Rivera*, 2004 WL 2955340, *26 (Hawaii Dec. 22, 2004)(citing *Apprendi*, 530 U.S. at 494). Even the Supreme Court itself has expressed concern over the obvious dichotomy

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[1] *See e.g. United States v. Ring,* 536 U.S. 584, 605 (2002)("the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question of 'who decides' a judge or a jury."); *United States v. Booker*, 2005 WL 50108, *7 (U.S. Jan. 15, 2005) (citing *Apprendi*, supra, at 478)("the fact that New Jersey labeled the hate crime as a "sentence enhancement" rather than a separate criminal act was irrelevant for constitutional purposes.")

between current Sixth Amendment case law and the applicability of *Almendarez-Torres*:

> *Almendarez-Torres*. . .has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was incorrectly decided. The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continued viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental imperative that the Court maintain absolute fidelity to the protections of the individual afforded by notice, trial by jury, and beyond-a-reasonable-doubt requirements.

Shepard v. United States, Thomas, J., concurring, 125 S.Ct. 1254, 1264 (2005) (internal citations and quotations omitted). Nevarez' Sixth Amendment rights outweigh the utility of an "eroded" and "wrongly decided" ruling, and as such he must be given the opportunity to have a jury determine the validity of any prior convictions which he did not stipulate to at trial and whether these convictions can enhance his sentence.

There is no reason why this Court cannot apply the Sixth Amendment protections provided to a defendant under *Apprendi* and *Blakely* and allow a sentencing jury to determine all enhancement aspects of Nevarez' sentence. Since *Blakely*, some courts, including those within the Second Circuit, have allowed defendants to request sentencing juries to decide whether sentencing factors are proven beyond a reasonable doubt. In *United States v. Khan*,

2004 U.S. LEXIS 13192 (E.D.N.Y. July 12, 2004), Judge Weinstein reasoned that:

> The judge is often unlikely to possess detailed knowledge or appreciation of the defendant's background and its subtle culture and linguistic characteristics. . .[thus] an advisory jury selected from a representative cross-section of the community may serve to bridge the lifestyle and empathy gap between judge and criminal, providing the insights and the opportunity for a more humane and effective administration of justice.

Id. at *3-4. The Court continued that "it is not aberrational to suggest that use of a jury on sentencing issues of fact—and perhaps on severity—is inconsistent with history, practice, and the inherent role of federal courts and juries." *Id.* at *40. Allowing a sentencing jury to determine the enhancement aspects of a defendant's sentence also helps ensure that a lower court's final sentencing decision will remain unaltered. Although such jury fact-finding may cause delay in the trial and sentencing process, the Supreme Court has recognized that "the interest in fairness and reliability protected by the right to a jury trial- a common-law right. . .now enshrined in the Sixth Amendment- has always outweighed the interest in concluding trials swiftly." *United States v. Booker*, 2005 WL 50108, *15 (U.S. Jan. 15, 2005). The decision in *Blakely* conferred upon Nevarez the Sixth Amendment right to have *any* fact, including prior convictions he has not stipulated to, which would increase his sentence beyond a reasonable doubt,

and thus a sentencing jury should be convened to determine Nevarez' proper sentence. See Colleen Murphy, *Prior Convictions, Jury Trial, and the Burden of Proof*, Federal Sentencing Reporter, Vol. 17, No. 3 (Feb. 2005) and Colleen P. Murphy, *The Use of Prior Convictions After Apprendi*, 37 U.C. Davis L.Rev. 973 (2004).

III. DID THE COURT ERR IN INCREASING NEVAREZ' SENTENCE FOR OBSTRUCTION OF JUSTICE WITHOUT SUBMITTING THE ISSUE TO A SENTENCING JURY IN VIOLATION OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS?

The standard of review is "reasonableness". *United States v. Booker*, 2005 WL 50108 (Jan. 15, 2005).

The Appellant did request a sentencing jury immediately after the verdict was read for purposes of determining if any enhancements, such as obstruction of justice, should be applied in this case. See pages 254-255 of Sentencing Transcript (hereafter "ST"). The *Khan* case from the Second Circuit supports convening a sentencing jury for this purpose.

Also, the trial court used the "mere preponderance" of the evidence standard at sentencing for determining the disputed facts of the alleged obstruction (and the applicable criminal history category). This runs counter to the recent decision by Chief U.S. District Judge Joseph Bataillon of Nebraska in *United States v. Okai*, 2005 WL 2042301 (D.Neb. Aug. 22,

2005), in which he held that the proper standard of proof is "beyond a reasonable doubt" to ensure that the Defendant's Fifth and Sixth Amendment rights are preserved. "Under the circumstances, the court finds that it should err on the side of caution in protecting a defendant's constitutional rights." (*Id.* at *10).

> "The Court finds that Okai, cannot be sentenced, consistent with due process, to a term of imprisonment for causing an amount of loss that exceeds the extent of his indictment and his admissions… Accordingly, the court sustains defendant's objections to the PSR and finds that the defendant's advisory guideline sentence is limited to the sentence that can be imposed based on facts alleged in the indictment, proved beyond a reasonable doubt, or admitted by the defendant." (*Id.* at *11).

The Court further deviated under *Booker* to an eight-month prison sentence. The Fifth Amendment rights involved are the due process rights of the defendant and the Sixth Amendment right is obviously the right to a jury trial. The Appellant submits that Judge Bataillon's opinion is the correct interpretation of the Supreme Court's "merits majority" decision in *Booker* and it is the only way to ensure that his Fifth and Sixth Amendment rights to due process and a jury trial are protected.

Furthermore, several circuits including ours have held it is erroneous for a court to increase a defendant's sentence for obstruction of justice without identifying with specificity or addressing the materiality of those portions of his testimony that the judge found to be intentional lies. See, e.g., *United*

States v. Brooks, 174 F.3d 950 (8th Cir. 1999); *United States v. Smith*, 62 F.3d 641 (4th Cir. 1995); *United States v. Montague*, 40 F.3d 1251 (D.C. Cir. 1994); and *United States v. Lawrence*, 972 F.2d 1580 (11th Cir. 1992). The findings at sentencing fall short of the inquiry and fact-finding required in order to impose the obstruction of justice enhancement. Simply referring to the PSR section dealing with obstruction is insufficient to impose this enhancement.

Furthermore, even if Nevarez' statements were inconsistent, that does not necessarily mean he obstructed justice. See *United States v. Thurmon*, 278 F.3d 790 (8th Cir. 2002) (defendant's inconsistent statements were accidental and did not constitute obstruction of justice). Finally, in *United States v. Werlinger*, 894 F.2d 1015 (8th Cir. 1990), this Circuit held that the Sentencing Commission did not intend for the obstruction of justice enhancement to apply cumulatively to the same conduct for which the defendant is convicted.

CONCLUSION

The Appellant respectfully prays that this Court reverse his conviction and vacate his unconstitutional, illegal sentence and remand this case for further proceedings.

Respectfully submitted,

JESUS NEVAREZ-SANCHEZ, Appellant

BY: _____

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CERTIFICATE OF SERVICE

I certify that I served two (2) true and accurate copies of the foregoing brief and a diskette copy containing the same upon Steven Russell by mailing copies of the same to him by U.S. first-class mail, postage prepaid, on October 21, 2005, to: Steven Russell; 487 Federal Building; 100 Centennial Mall North; Lincoln, NE 68508

_____
Jeremy P. Murphy

CERTIFICATE OF DISKETTE AND WORD PROCESSOR

Pursuant to Rule 28(A)(d) of the 8th Circuit Rules of Appellate Procedure, I hereby certify that the enclosed computer diskette has been scanned for viruses and is virus-free. The brief was created using Microsoft Word for Windows 2000.

_____
Jeremy P. Murphy

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(B), counsel hereby certifies that the principal text of this brief satisfies that type-volume limits imposed by the same rule. According to counsel's word processor, the brief contains 4,425 words and 550 lines.

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Jeremy P. Murphy

ADDENDUM